VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: C. Donald Mohr
35 East 85th Street
New York, N.Y. 10028

Declaratory Ruling #182

On December 12, 1986 a petition for declaratory ruling was filed with the Environmental Board ("Board") by C. Donald Mohr on the question of whether there is Act 250 jurisdiction over the extraction of earth materials on property which Mr. Mohr owns in Peacham, Vermont.

On December 18, 1986, the Board notified the parties of its intention to conduct the hearing in this matter by way of an administrative hearing officer pursuant to Board Rule 41 and 3 V.S.A. § 813. The hearing officer Board Chairman Darby Bradley convened a public hearing in the proceeding on January 26, 1987 in Peacham, Vermont.

The following persons appeared at and participated in the hearing:

Petitioner C. Donald Mohr by himself at the hearing and subsequently by Richard H. Saudek, Esq.
Adjoining Property Owners Paul and Alice Hoon by Edward Zuccaro, Esq.
Adjoining Property Owner Walter Pierce by Otis Goss.
Mary Quimby, a resident of Peacham, attended the hearing but did not participate.

Following the January 26 hearing, the Petitioner submitted the sworn affidavits of Randall Kindberg, Stephen White and Richard Stevenson. In addition, Dr. Hoon submitted a letter together with his records of the number of trucks he observed passing his home on certain days in the late summer and early autumn of 1986. The parties agreed to waive cross-examination and stipulated that the affidavits and Dr. Hoon's letter and records could be admitted into the record without reconvening the hearing. Accordingly, these documents were marked as Board Exhibits #10-13 respectively, and are hereby admitted into the record.

A proposed decision was issued by the Chairman on April 2, 1987. The parties were given an opportunity to submit written objections and request oral argument before the full Board. The Petitioner filed a request for oral argument on April 17, but subsequently withdrew that request, relying upon the written briefs and argument. The Board conducted a deliberative session on May 14, 1987. On that date the Board determined the record complete and adjourned the hearing. The following findings of fact and conclusions of law are based upon the record developed at the hearing.

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I. ISSUES IN THE PROCEEDING

The issue sought to be resolved by the declaratory ruling request is whether the extraction of earth materials from the Mohr property constitutes a "development" pursuant to 10 V.S.A. § 6001(3). Mr. Mohr contends that the removal of material from his property is not for a commercial purpose and is only being accomplished to level his property for personal recreational purposes. Parties in opposition contend that Mr. Mohr has opened a commercial gravel extraction operation on his property because the material is being removed for resale and because Mr. Mohr is receiving something of value for this material.

II. FINDINGS OF FACT

1. C. Donald Mohr owns approximately 170 acres of land, with buildings, on Town Highway #8 in Peacham, Vermont. Mr. Mohr and his family have used the property for vacations for 15 years.

2. On or about July 1986, Mr. Mohr arranged with a contractor, Randall Kindberg, to clear and level a five-acre portion of the property to create a field. Mr. Kindberg, a nephew of Mr. Mohr and a contractor residing in West Danville, agreed that in lieu of monetary compensation for this work, he would accept the material from the site as payment. The material at the site was composed predominantly of rotted rock known as "cow hill sand." The sand can be used in construction jobs, such as for building roads or backfilling around foundations. Mr. Mohr agreed to pay Mr. Kindberg in cash for sowing grass seed on the site after it had been leveled and loamed.

3. Mr. Kindberg has no ownership or leasehold interest in the property owned by Mr. Mohr. Mr. Mohr has no interest in Mr. Kindberg's construction business.

4. From July 25, 1986, when removal of material began, until late October, 1986, when removal ceased, Mr. Kindberg removed 256 loads of material on 34 separate days averaging between six and seven loads per day. Each load contained approximately seven cubic yards of material. The maximum amount Mr. Kindberg removed on a single day was approximately 29 loads. Except for a few loads of material removed by a third party, all of the material was removed by Mr. Kindberg or his employees. Most of that material was used in Mr. Kindberg's construction business.

5. Mr. Mohr had intended to clear and level five acres of land. At the time the excavation activities ceased in late October, approximately one-half acre had been cleared and excavated. A stockpile of material had been made in the middle of the excavated area for future removal. Photographs taken of the site in September (Exhibit #8) indicate that the excavation had been as much as 10-15 feet deep.

6. Paul and Alice Hoon have owned a parcel of land adjoining the Mohr property for 23 years. The Hoon residence is located approximately 845 feet from the site of excavation on the Mohr property. Much of the material excavated from the Mohr property was trucked along Town Highway #8 past the Hoon residence.

7. The Town of Peacham has adopted permanent zoning regulations, but has not adopted subdivision regulations.

III. CONCLUSIONS OF LAW

Section 6001(3) of 10 V.S.A. Chapter 151 (Act 250) in pertinent part defines development as:

> the construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes. "Development" shall also mean the construction of improvements for commercial or individual purposes on more than one acre of land within a municipality which has not adopted permanent zoning and subdivision bylaws.

If a construction project qualifies as "development" pursuant to this definition, a permit is required pursuant to § 6081(a).

In this case it is clear that Mr. Mohr has initiated the construction of improvements on more than one acre of land in a municipality without both permanent zoning and subdivision bylaws. Therefore the only question to be resolved in the declaratory ruling is whether the construction initiated by Mr. Mohr but undertaken by Mr. Kindberg has been for a "commercial purpose." Environmental Board Rule 2(L) defines "commercial purpose" as "the provision of facilities, goods, or services by a person other than for a commercial or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object having value."

Based upon the above facts, the Board concludes that the clearing and leveling of this site and the sale of the material from the site has been undertaken for a commercial purpose and therefore is a "development" as defined in the statute. The Board reaches this conclusion because it is clear that earth materials are being removed from this site in exchange for something of value. Mr. Kindberg received money from his customers for these materials, while Mr. Mohr is receiving extensive excavating services in exchange for those materials from Mr. Kindberg. The landowner, Mr. Mohr, initiated the extraction operation and ultimately controls it.

No party disputes the fact that most of the material extracted from the site has been used in various construction projects in the area. Mr. Mohr's position is, however, that the use relates to Mr. Kindberg's commercial purpose and should not be imputed to him. He argues that his only purpose is to create a field for his own recreational and aesthetic enjoyment, and that he has no intent to use his land for commercial or industrial purposes after the excavation has been completed.

The Board disagrees. What is really happening on the ground in this case is no different from a commercial sand and gravel operation of the type which is routinely subjected to Act 250 review. The fact that Mr. Mohr chose to forego any monetary payment for the removal of the sandy material, and was instead paid in the services rendered by Mr. Kindberg, does not alter this conclusion. The impact upon the immediate site and the surrounding neighborhood in terms of noise, dust, traffic, and the other subjects regulated by Act 250 is no different simply because the commercial activity is carried on by a person other than the landowner.

The fact that this project is a commercial operation is underscored by the volume of material being removed. Some two hundred fifty-six truckloads of material have already been removed from the site. Each truck carries approximately seven cubic yards, so that approximately 1800 cubic yards have been removed to date. With only one-half acre of the expected five acres completed by October, the total volume of material to be extracted could reach 18,000 cubic yards, and possibly much more, depending upon the terrain and depth of extraction. This is not a case where a contractor hired to level a field is required to remove a de minimus amount of excess material. This is a commercial excavation operation, an incidental result of which is the creation of a field.

When, as here, a statute is capable of more than one reasonable interpretation, the Board must interpret the language of the statute in a manner which carries out the legislative intent that led to the statute's adoption. In re Classification of Ranch Brook, 146 Vt. 602, 606 (1986). While the General

Assembly clearly did not intend to extend Act 250 jurisdiction to all land development in Vermont, it did intend to require Act 250 review of the construction of improvements for commercial purposes on more than one acre of land in towns which do not have both permanent zoning and subdivision regulations 10 V.S.A. **§ 6001(3).** It is the commercial nature of the activity, not the person conducting the activity or benefiting therefrom, that triggers Act 250 jurisdiction. Because the operation on Mr. **Mohr's** land is being conducted for a commercial purpose, and is not otherwise exempt-from Act 250 jurisdiction, the Board concludes that an Act 250 permit is required.

IV. ORDER

In view of our conclusion that Mr. Mohr has initiated a development on his property, a land use permit pursuant to 10 V.S.A. § 6081(a) must be secured from the District #7 Environmental Commission prior to the resumption of extraction operations on this property.

Dated at Montpelier, Vermont this 27th day of May, 1987.

ENVIRONMENTAL BOARD

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